Supreme Court
FILED
DEC - 1 2001
OFFICE OF THE CLERK

Nos. 01-653, 01-654, 01-657

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *Petitioner*,
v.
NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, *Petitioner*,
v.
NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

ARCTIC SLOPE REGIONAL CORP., *et al.*, *Petitioners*,
v.
NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Petitions For Writs Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR NEXTWAVE PERSONAL COMMUNICATIONS INC. AND NEXTWAVE POWER PARTNERS INC. IN OPPOSITION

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QUESTION PRESENTED

Section 525(a) of the Bankruptcy Code provides that "a governmental unit may not . . . revoke . . . a license . . . or other similar grant to . . . a bankrupt . . . solely because such bankrupt . . . has not paid a debt that is dischargeable" in bankruptcy. 11 U.S.C. § 525(a). The question raised in the petitions is whether the court of appeals correctly held that the plain language of § 525(a) precluded the Federal Communications Commission from revoking licenses held by a debtor in bankruptcy solely because such debtor had not made installment payments on debts that are dischargeable in bankruptcy.

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

Respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. are both wholly owned subsidiaries of NextWave Telecom Inc. ("NTI"). No publicly traded company owns 10 percent or more of NTI's stock.

In addition to the petitioners in Nos. 01-653, 01-654, and 01-657, several intervenors in the proceeding below are also parties to this proceeding under Rule 12.6. They include the following:

AT&T Wireless Services, Inc. (more than 10 percent of the stock of which is owned by NTT DoCoMo);

BellSouth Corporation;

BellSouth Cellular Corporation;

Cellular Telecommunications Industry Association;

Cingular Wireless (more than 10 percent of the stock of which is owned by BellSouth Corporation);

Dobson Communications Corporation (more than 10 percent of the stock of which is owned by AT&T Wireless Services, Inc.);

Nextel Communications, Inc. (more than 10 percent of the stock of which is owned by Motorola, Inc., and its subsidiaries);

Sprint Spectrum L.P. d/b/a Sprint PCS (which is wholly owned by Sprint Corporation);

TeleCorp PCS, Inc. (more than 10 percent of the stock of which is owned by AT&T Wireless Services, Inc.); and

VoiceStream Wireless (which is wholly owned by Deutsche Telekom)

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

A. NextWave's Spectrum Licenses 1

B. NextWave's Bankruptcy Proceeding 3

C. The Attempt To Cancel NextWave's Licenses 5

D. The Second Circuit's Mandamus Decision 6

E. Judicial Review Of The Attempted Cancellation 7

F. Developments After The D.C. Circuit's Decision 10

REASONS FOR DENYING THE WRIT 11

I. The Judgment Below Does Not Conflict With The Decisions Of Any Other Court 11

A. No conflict exists between the decision below and the rulings of the Second Circuit 11

B. The judgment below does not conflict with the decisions of other circuits 13

II. The Question Presented Is Not Sufficiently Important To Warrant Review 15

A. The question presented is of narrow applicability and is unlikely to recur 16

TABLE OF CONTENTS
(continued)

Page

B. Review is inappropriate because alternative grounds justify the decision 19

C. This Court has already denied certiorari in a "closely related" case that had a far greater impact on the FCC's auction program 22

III. The Judgment Below Is Clearly Correct 24

A. The FCC's attempted "automatic" license revocation occurred "solely because" NextWave failed to pay its debt 24

B. NextWave's debt is "dischargeable" within the meaning of § 525(a) 27

C. Nothing in the Communications Act or the Bankruptcy Code allows the FCC to trump § 525(a) 29

CONCLUSION 30

APPENDIX A 1a

APPENDIX B 3a

APPENDIX C 6a

APPENDIX D 8a

TABLE OF AUTHORITIES

Page(s)

CASES

Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264 (9th Cir. 1990) 14

Exxon Mobil Corp. v. Baker, 531 U.S. 919 (2000) 22

In re 48th Street Steakhouse, Inc., 835 F.2d 427 (2d Cir. 1987) 20

In re Bill, 90 B.R. 651 (Bankr. D.N.J. 1988) 26

In re Cent. Ark. Broad. Co., 68 F.3d 213 (8th Cir. 1995) 20

In re Exquisito Servs., Inc., 823 F.2d 151 (5th Cir. 1987) 14

In re Fugazy Express, Inc., 124 B.R. 426 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2d Cir. 1992) 20

In re GWI PCS 1, Inc., 230 F.3d 788 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2623 (2001) 20,23,24

In re Tak Communications, Inc., 985 F.2d 916 (7th Cir. 1993) 20

In re Walker, 927 F.2d 1138 (10th Cir. 1991) 26

In re Williams, 158 B.R. 493 (Bankr. D. Idaho 1993) 26

Laracuente v. Chase Manhattan Bank, 891 F.2d 17 (1st Cir. 1989) 14

Lawson v. Murray, 515 U.S. 1110 (1995) 19

Ross v. Moffit, 417 U.S. 600 (1974) 24

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 19

TABLE OF AUTHORITIES
(continued)

Page(s)

Trinity Broad. of Florida, Inc. v. FCC, 211 F.3d 618 (D.C. Cir. 2000).....21

TRW Inc. v. Andrews, 122 S. Ct. 441 (2001) 21,29

United States v. GWI PCS 1, Inc., 245 B.R. 59 (N.D. Tex. 1999), *aff'd*, 230 F.3d 788 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2623 (2001) 3,22

United States v. Mitchell, 463 U.S. 206 (1983).....22

United States v. Whiting Pools, 462 U.S. 198 (1983) 20

Youakim v. Miller, 425 U.S. 231 (1976) 29

STATUTES AND REGULATIONS

11 U.S.C. § 101(5).....27

11 U.S.C. § 101(12).....27

11 U.S.C. § 106 29

11 U.S.C. § 362(a).....4,5

11 U.S.C. § 362(a)(4) 8,9,19,20

11 U.S.C. § 362(a)(5) 8,9,19,20

11 U.S.C. § 362(b)(4).....8,20,29

11 U.S.C. § 362(c).....4

11 U.S.C. § 363(c)(1) 4

11 U.S.C. § 365 17

11 U.S.C. § 365(b)(1).....18

11 U.S.C. § 503 18

11 U.S.C. § 507(a)(1) 18

TABLE OF AUTHORITIES
(continued)

Page(s)

11 U.S.C. § 523 27

11 U.S.C. § 525(a).....5,8,28

11 U.S.C. § 541(a)(1)(B).....4

11 U.S.C. § 544 4

11 U.S.C. § 1123 5

11 U.S.C. § 1123(a).....22

11 U.S.C. § 1123(a)(5)(G).....22

11 U.S.C. § 1124 5

11 U.S.C. § 1129(a)(9)(A).....18

11 U.S.C. § 1141(d)(1)(A) 27,28

28 U.S.C. § 2342 12

47 U.S.C. § 309(j)(6)(C) 30

47 U.S.C. § 402 6,7,12,13

47 C.F.R. § 1.2109(a) (2000) 17

47 C.F.R. § 1.2110(e)(4)(iii) (1997).....21

47 C.F.R. § 1.2110(f)(4)(iv) (1998) 21

OTHER AUTHORITIES

4 COLLIER ON BANKRUPTCY ¶ 525.02 (15th ed. rev. 2001) 26

In re Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, 13 FCC Rcd. 374 (1997).....16

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Amendment of Part I of the Commission's Rules-Competitive Bidding Procedures, 15 FCC Rcd. 21,520 (2000) 16

Competitive Bidding Proceeding, 63 Fed. Reg. 2315 (1998) 17

H.R. REP. NO. 95-595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963 10,17,25

S. REP. NO. 75-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 26

Jeff Bounds, *Out of Pocket: Creditors Plan New Wireless Firm*, DALLAS BUS. J., Apr. 10, 1998 3

Yochi J. Dreazen & Pui-Wing Tam, *Qualcomm to Invest in NextWave, Center of Wireless-Market Dispute*, WALL ST. J., Aug. 17, 2001 10

BRIEF IN OPPOSITION

Respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. (collectively, "NextWave") respectfully submit this brief in opposition to the three petitions for certiorari in this case. NextWave's reorganization proceedings have given rise to two previous denials of certiorari by this Court. The same result should occur here, as the petitions do not present an issue warranting review by the Court. The decision below implements the plain language of Bankruptcy Code § 525(a); it does not conflict with any decisions of the courts of appeals or of this Court; it is supported by alternative grounds that are not included within the question presented in the petitions; and the question presented is unlikely to recur, as it arises in the context of a unique financing program that has since been abandoned. Accordingly, certiorari should be denied.

STATEMENT OF THE CASE

Although the statutory provision governing this case is straightforward and unambiguous, the complex factual and procedural history serves only to confirm the unique nature of the question presented and the absence of any realistic possibility that this question will continue to arise in the future.

A. NextWave's Spectrum Licenses

NextWave was formed in 1995 as a "designated entity" to develop a business as a nationwide wholesaler of wireless services and airtime. During the FCC's C-Block auctions that concluded in May 1996 and a reauction in July 1996, NextWave was the high bidder for 63 licenses, with bids that totaled $4.74 billion. In compliance with FCC regulations, NextWave promptly made a $237 million down payment to the FCC and filed applications for the licenses. Pet. App. 312a-313a.

The FCC did not approve NextWave's license applications until early the following year, whereupon NextWave

made an additional $237 million payment. Pet. App. 313a. The FCC formally issued NextWave's C-Block licenses in February 1997, took a security interest in each license, and filed UCC financing statements in several states to perfect its liens against the licenses. *Id.* at 40a, 159a n.7. NextWave signed promissory notes to the FCC reflecting the balance of the amounts owed on the licenses. *Id.* at 313a.[1]

In the months after the C-Block auctions concluded, NextWave made significant progress toward building out its network. By early 1997, NextWave had 22 offices around the country and employed more than 600 employees and contractors. C.A. App. 1184-85. In addition to raising over $600 million of initial working capital, the company had secured more than $2 billion in financing commitments from major vendors for deployment of network equipment, and was working with leading investment banking firms to secure additional working capital financing. By mid-1997, NextWave had obtained 90 percent of the microwave links necessary for its initial launch, had 7 switch sites, and had prepared 30 percent of its cell sites for build-out. *Id.* at 1185. NextWave expected to launch service in 4 major markets in late 1997 and had completed engineering designs for 22 markets. The company had also entered into airtime purchase contracts with other wireless carriers committing them to purchase in excess of 35 billion minutes of use from NextWave on a wholesale basis. *Id.*

Before NextWave finally received its C-Block licenses in February 1997, the FCC held another round of auctions, flooding the spectrum market with nearly 1500 additional PCS licenses. Pet. App. 309a. With the release of so many additional licenses, the market price for spectrum fell dramatically, to less than one-quarter of the high bids at the C-

[1] NextWave was also granted a number of F-Block licenses for which it was the high bidder at subsequent auctions. Pet. App. 313a-314a. NextWave made down payments of $28 million to the FCC reflecting a portion of the purchase price for those licenses and signed promissory notes for the balance of the bid amounts.

Block auctions. *Id.* at 310a. As a result, the vast majority of C-Block licensees experienced great difficulty securing the financing necessary to build out their networks and make payments on their debts to the FCC.

In response to those difficulties, the FCC initiated a series of proceedings to restructure the payment and financing obligations of C-Block licensees and temporarily suspended their installment payment obligations. Pet. App. 5a-6a. Despite this temporary respite, the second- and third-largest C-Block license holders—Pocket Communications and GWI PCS—each filed for bankruptcy during 1997. GWI also filed a fraudulent conveyance action, seeking to reduce the amount of its license-related debts to the FCC. The bankruptcy court ruled for GWI and, on June 4, 1998, reduced GWI's payment obligations to the FCC by 80 percent. *See United States v. GWI PCS 1, Inc.*, 245 B.R. 59, 61 (N.D. Tex. 1999), *aff'd*, 230 F.3d 788 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2623 (2001).[2]

Unlike GWI and Pocket, NextWave did not immediately file for bankruptcy. Instead, NextWave continued its efforts to obtain additional financing and build out its network. NextWave sought to stave off bankruptcy by curtailing its operations and laying off hundreds of employees and contractors, but those efforts proved insufficient. By mid-1998, NextWave owed more than $400 million to trade and financial creditors, and faced attachment proceedings across the country. C.A. App. 1187-88.

B. NextWave's Bankruptcy Proceeding

To preserve assets for the benefit of creditors, and to sustain the company as an ongoing enterprise, NextWave filed for Chapter 11 bankruptcy protection on June 8, 1998. As

[2] In the Pocket Communications bankruptcy proceeding, the FCC agreed in March 1998 to a reorganization plan that allowed 14 C-Block licenses to be retained for only 63 percent of what Pocket had bid for them. *See* Jeff Bounds, *Out of Pocket: Creditors Plan New Wireless Firm*, DALLAS BUS. J., Apr. 10, 1998.

contemplated by the Bankruptcy Code, NextWave's bankruptcy filing was made to provide it with breathing room sufficient to preserve its assets and permit it to reorganize its business. Once in bankruptcy, NextWave made no payments to creditors, including the FCC, in keeping with the Bankruptcy Code's general prohibition against the payment of prepetition debts while in bankruptcy (*see* 11 U.S.C. §§ 363(c)(1), 541(a)(1)(B)) and the Code's "automatic stay" provision, which generally suspends collection and payment of debts incurred before bankruptcy. *See* 11 U.S.C. § 362(a), (c). The FCC itself conceded the applicability of this fundamental tenet of bankruptcy law, reassuring the bankruptcy court that "NextWave will still enjoy bankruptcy protection from collection of C Block license payments pending reorganization of its business affairs." Pet. App. 181a (emphasis omitted).

In reliance on the fraudulent conveyance decision in *GWI*, and pursuant to its fiduciary duty to protect its creditors and investors, NextWave also brought an action in the bankruptcy court under 11 U.S.C. § 544, seeking to adjust the FCC's claims to reflect the value of the licenses on the date that NextWave finally received them. The bankruptcy court ruled in NextWave's favor. *See* Pet. App. 138a-141a.

The FCC appealed, and the district court affirmed. Pet. App. 254a-272a. On further appeal, however, the Second Circuit reversed. *Id.* at 213a-253a. Noting that "jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals," the Second Circuit concluded that the bankruptcy and district courts "were utterly without the power" to rule on NextWave's retention of its licenses. *Id.* at 233a-234a, 236a.

In December 1999, NextWave submitted a new plan of reorganization which addressed the Second Circuit's decision, providing for full payment to the FCC and other creditors, including all past-due amounts, penalties, and interest. Pet. App. 146a-147a. On January 11, 2000, NextWave submitted an enhanced proposal to the FCC, contemplating "a single lump sum payment to satisfy its entire $4.3 billion out-

standing obligation" to the FCC. *Id.* at 12a. NextWave's plan was scheduled for a confirmation hearing in the bankruptcy court on January 21, 2000. Thus, within 18 months of seeking bankruptcy protection, NextWave had rehabilitated itself and was poised to fulfill the purposes of the Bankruptcy Code with a plan of reorganization that would pay all creditors in full.

C. The Attempt To Cancel NextWave's Licenses

The FCC refused to accept NextWave's offer of full payment. Instead, on January 12, 2000—just nine days before the scheduled confirmation hearing—the FCC objected to NextWave's proposed plan and issued a public notice announcing that NextWave's licenses would be reauctioned. Pet. App. 96a-101a, 147a-148a; C.A. App. 452-63. The FCC asserted that NextWave's licenses had automatically canceled more than a year earlier, because NextWave, in accordance with its obligations as a debtor in bankruptcy, had not made installment payments to the FCC during the bankruptcy proceedings. Pet. App. 96a-97a (asserting that license cancellation occurred for certain licensees like NextWave that "were participating in the Commission's installment payment plan and were more than 90 days delinquent for the July 31, 1998 resumption payment"); C.A. App. 452-55. The FCC had never previously expressed the view that the licenses had automatically canceled, and instead had repeatedly made contrary representations to the bankruptcy and district courts. Pet. App. 21a-22a, 148a, 181a-186a.

NextWave sought relief in the bankruptcy court, which held that the FCC's attempted cancellation and reauction of NextWave's licenses violated multiple provisions of the Bankruptcy Code, including the automatic stay (11 U.S.C. § 362(a)) and the debtor's right to cure defaults (11 U.S.C. §§ 1123, 1124). Pet. App. 134a-212a.[3] The court also held

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[3] The bankruptcy court did not rule on the merits of NextWave's claim that the FCC's attempted cancellation also violated 11 U.S.C. § 525(a). Pet. App. 168a.

that the attempted cancellation was irreconcilable with the FCC's prior representations that the licenses had not canceled, describing the FCC's about-face as "shocking." Pet. App. 135a, 181a-191a. The court identified numerous instances in which the FCC and its counsel had acted in a manner directly inconsistent with the late-blooming automatic cancellation theory. For example, the FCC's counsel specifically represented that NextWave's licenses had not been "automatically cancelled .... in this case due to the automatic stay," and the FCC confirmed that "[d]uring the pendency of the bankruptcy, the Bankruptcy Court and the automatic stay would hold the creditors at bay, including the Federal Communications Commission." *Id.* at 182a (emphasis omitted).

D. The Second Circuit's Mandamus Decision

The FCC sought mandamus relief from the Second Circuit, which vacated the bankruptcy court's order. Pet. App. 102a-133a. The Second Circuit held that mandamus was warranted because the bankruptcy court lacked jurisdiction to review the FCC's cancellation of NextWave's licenses. The Second Circuit explained that "[e]xclusive jurisdiction over review of final FCC orders is vested in the Courts of Appeals" under 47 U.S.C. § 402, which vests exclusive jurisdiction to review FCC orders in the federal courts of appeals (here, the D.C. Circuit). Pet. App. 128a-129a (quoting *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984)); *see also id.* at 108a ("review of the FCC's regulatory decisions and orders is entrusted solely to the federal courts of appeals and is therefore outside the jurisdiction of the bankruptcy and district courts"); *id.* at 124a.

The Second Circuit emphasized, however, that in a § 402 proceeding before the D.C. Circuit, NextWave would be "free to pursue its challenge to the FCC's regulatory acts." Pet. App. 131a. Thus, the court repeatedly and emphatically declined to adjudicate the validity of the attempted cancellation. *Id.* at 103a ("We make no comment on the prospects of the (precautionary) appeals filed by NextWave in the Court

of Appeals for the District of Columbia Circuit."); *id.* at 126a n.8 ("we have no occasion to opine on whether the Public Notice [announcing the license cancellation] is valid or whether the Licenses automatically canceled at some prior date"); *id.* at 127a ("we have no occasion to express an opinion" on whether "the bankruptcy court is right on the merits of its arguments against revocation").[4]

E. Judicial Review Of The Attempted Cancellation

Prior to the FCC's commencement of the mandamus proceeding in the Second Circuit, NextWave had filed with the FCC a petition for reconsideration of the automatic cancellation. The FCC denied NextWave's petition in September 2000, opining (without analysis) that the Second Circuit's May 2000 mandamus decision had already resolved NextWave's bankruptcy-related challenges. *Id.* at 83a.

Consistent with the Second Circuit's mandamus decision, NextWave appealed to the D.C. Circuit pursuant to 47 U.S.C. § 402, asserting that the FCC's cancellation decision was arbitrary and capricious and contrary to law in violation of the Administrative Procedure Act and the Bankruptcy Code. Despite the pendency of that appeal, the FCC chose to reauction NextWave's licenses to third parties beginning in December 2000.[5] The FCC's auction notice and rules spe-

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[4] Although the Second Circuit addressed the applicability of the police-power exception to the automatic stay (§ 362(b)(4)), it did so only as part of its jurisdictional analysis. Pet. App. 126a & n.8. The Second Circuit was entirely silent about NextWave's claims under § 525(a).

[5] NextWave asked the FCC and the D.C. Circuit to stay the reauction. In response, the FCC explained to the D.C. Circuit that it "ha[d] expressly conditioned the results of the auction on the outcome of this case" and that, "notwithstanding the auction, if NextWave prevails before this Court it will get its licenses back." App., *infra*, 1a, 2a. Several large telecommunications companies, including the petitioner in No. 01-654 and one of the petitioners in No. 01-657, intervened in the D.C. Circuit to oppose a stay of the reauction; they also stressed the reauction's conditional nature.

cifically cautioned prospective bidders that the results would be subject to the outcome of NextWave's pending legal challenges to the license cancellation. Thus, all bidders (including petitioners in Nos. 01-654 and 01-657) were on notice of NextWave's claims to the licenses. The reauction concluded in January 2001, but the FCC never issued licenses to the high bidders in the reauction for the spectrum covered by NextWave's licenses.

In June 2001, the D.C. Circuit reversed the FCC's attempted cancellation of NextWave's licenses. Pet. App. 1a-51a. The court held that the cancellation violated Bankruptcy Code § 525(a), and also concluded that NextWave's licenses were protected by the lien-enforcement provisions of the automatic stay, 11 U.S.C. § 362(a)(4)-(5).

The D.C. Circuit repeatedly stressed the direct applicability of the plain language of § 525(a), which declares that "a governmental unit may not . . . revoke . . . a license . . . or other similar grant to . . . a bankrupt . . . solely because such bankrupt . . . has not paid a debt that is dischargeable . . . under this title." 11 U.S.C. § 525(a); *see* Pet. App. 39a, 46a. Because the attempted license cancellation was triggered solely by NextWave's failure to make a payment while under the protection of the bankruptcy laws, the court concluded that the FCC's cancellation attempt constituted a clear violation of § 525(a). *Id.* at 38a.

The D.C. Circuit also rejected each of petitioners' attempts to evade application of the plain language of § 525(a). First, the court refuted the FCC's contention that § 525(a)'s limitations on license cancellation should be no broader than the automatic stay in § 362, which (unlike § 525(a)) contains a general exception for actions enforcing "police and regulatory power." 11 U.S.C. § 362(b)(4). The court described that contention as "inconsistent with § 525's plain language"

App., *infra*, 3a-5a. Following these assurances that NextWave would not suffer irreparable injury, the D.C. Circuit declined to stay the reauction.

and with case law demonstrating that "section 525 can apply even if the automatic stay does not." Pet. App. 39a.

In addition, the D.C. Circuit held that "section 362's automatic stay *does* apply here." *Id.* at 41a (emphasis in original). The court explained that the FCC's attempted cancellation of the licenses constituted lien-enforcement behavior that violated 11 U.S.C. § 362(a)(4)-(5), provisions of the automatic stay to which the police-power exception does not apply. Pet. App. 40a-41a.

The D.C. Circuit next rejected petitioners' arguments that NextWave's license-related debt was not "dischargeable" within the meaning of § 525(a). The court explained that the Second Circuit had not resolved that issue, or indeed any questions about the application of § 525(a). *Id.* at 30a-32a, 41a-42a. Nor was the D.C. Circuit persuaded by the FCC's claim that NextWave's obligation to pay is a "regulatory requirement" and therefore not a "debt." As the court concluded (and as FCC counsel conceded below, Pet. App. 43a), this semantic recharacterization would require a court to import an implied regulatory-purpose exception into § 525(a), flouting the structure of the Bankruptcy Code and violating basic principles of statutory construction. Not only do other prohibitions in the Code contain express regulatory exceptions (*e.g.*, parts of the automatic stay), but § 525(a) itself expressly exempts certain government actions (*e.g.*, by the Department of Agriculture), thus confirming that Congress did not intend to create an exemption for other agencies such as the FCC. Pet. App. 43a-44a.

The D.C. Circuit also found that the FCC cancelled NextWave's licenses "solely because" of NextWave's failure to make a payment while in bankruptcy. The court explained that the FCC made no effort whatsoever to consider any "extrinsic evidence of fitness to hold a license" (Pet. App. 47a), and instead used NextWave's missed payment as the "'sole' trigger" for its automatic cancellation. *Id.* at 45a. Indeed, the FCC "never denie[d] that if NextWave had made its payments, the company could have retained its licenses." *Id.* at 38a. By looking at "no other factor [than non-payment] in

determining whether NextWave should retain its licenses" (*ibid.*), the FCC violated the purpose of § 525, which is precisely "to prevent an automatic reaction" against a debtor who "avail[s] himself of the protection of the bankruptcy laws." *Id.* at 46a (quoting H.R. REP. NO. 95-595, at 165 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6126).

Because of its resolution of NextWave's claims under § 525(a) and the automatic stay, the D.C. Circuit found it unnecessary to decide whether the FCC's attempted cancellation also violated NextWave's right to cure and fundamental principles of due process, fair notice, and estoppel.

In August 2001, the FCC sought a stay of the D.C. Circuit's mandate. Concluding that the FCC had not demonstrated that its petition for a writ of certiorari "would present a substantial question," the court unanimously denied the motion. App., *infra*, 6a-7a.

F. Developments After The D.C. Circuit's Decision

In the months following the D.C. Circuit's decision, NextWave resumed implementation of its plans to emerge from bankruptcy and build out a nationwide third-generation wireless network. Within 45 days of the D.C. Circuit's decision, on August 6, 2001, NextWave filed a new plan of reorganization with the bankruptcy court, again providing for full payment to all creditors, including the FCC. To accomplish the build-out of its network, NextWave also secured financing commitments totaling approximately $5 billion and entered into a $100 million hardware contract with Lucent Technologies to continue deploying its advanced wireless network while still in bankruptcy. *See* Yochi J. Dreazen & Pui-Wing Tam, *Qualcomm to Invest in NextWave, Center of Wireless-Market Dispute*, WALL ST. J., Aug. 17, 2001, at B3. With Lucent's assistance, NextWave has been progressing rapidly with completing the build-out of its network.

After the petitions for writs of certiorari were filed in this case, the FCC and the other petitioners reached a contingent settlement of this litigation with NextWave that would have left the D.C. Circuit's decision intact and unreviewable.

See App., *infra*, 8a-9a. That agreement terminated by its terms on December 31, 2001, due to a lack of implementing legislation. Throughout its bankruptcy, NextWave has pursued the build-out of its wireless network. Indeed, as of January 31, 2002, NextWave had already deployed operational wireless facilities in more than 50 markets. NextWave intends to deploy operational systems in its remaining markets within the first half of this year, and plans to offer commercial services within the same time frame.

REASONS FOR DENYING THE WRIT

I. The Judgment Below Does Not Conflict With The Decisions Of Any Other Court

The D.C. Circuit's decision does not conflict with the decisions of any other court. Instead, the decision below reflects nothing more than a straightforward application of the plain language of § 525(a) to the particular facts of this case. No other appellate court has ever addressed the application of § 525(a) in this context.

A. No conflict exists between the decision below and the rulings of the Second Circuit

Petitioners allege that there is a conflict between the judgment below and the earlier decisions of the Second Circuit in this litigation. *See* FCC Pet. 13 (identifying purported "conflict" between the D.C. Circuit "holding" and the Second Circuit "analysis"); *see also id.* at 30; Verizon Pet. 19; Arctic Pet. 13. Petitioners are mistaken. The D.C. Circuit squarely rejected as "implausible" petitioners' contention that the Second Circuit adjudicated the merits of NextWave's claims. Pet. App. 30a. Instead, the D.C. Circuit correctly recognized the Second Circuit's holding as jurisdictional in nature: "the Second Circuit principally decided . . . that the bankruptcy court *lacked jurisdiction*" to apply the Code to these acts. Pet. App. 31a (emphasis added); *see also id.* at 25a ("the Second Circuit repeatedly stated that it was making a 'jurisdictional' decision based on [47 U.S.C. §] 402").

The D.C. Circuit was plainly correct in concluding that the Second Circuit had left to the D.C. Circuit the adjudication of the merits of NextWave's claims under the Bankruptcy Code. The Second Circuit did not even cite § 525(a), much less purport to resolve any claim arising under that statute, which is not surprising since the bankruptcy court itself did not rule on NextWave's § 525(a) claim. Instead, the Second Circuit expressly refrained from applying the substantive provisions of the Bankruptcy Code to the license cancellation, and pointedly expressed no opinion on what the result of that application might be in the D.C. Circuit—the court that the Second Circuit identified as the only forum with jurisdiction to resolve the merits of NextWave's claims. *See* Pet. App. 131a-132a ("NextWave remains free to pursue its challenge to the FCC's regulatory acts" and "has filed protective notices of appeal in the D.C. Circuit"); *id.* at 103a ("We make no comment on the (precautionary) appeals filed by NextWave in the Court of Appeals for the District of Columbia Circuit."); *id.* at 127a ("[e]ven if the bankruptcy court is right on the merits of its arguments against revocation—we have no occasion to express an opinion . . ."). [6]

Petitioners' assertions are further contradicted by the Second Circuit's repeated emphasis that its holding was predicated on 28 U.S.C. § 2342 and 47 U.S.C. § 402, which confer exclusive jurisdiction to review FCC decisions on the courts of appeals (here, the D.C. Circuit). For example, the Second Circuit made clear that "[t]he bankruptcy court lacked jurisdiction to declare the [FCC's] Public Notice null and void on any ground: that the Public Notice violated the automatic stay, that the right to cure obviates any default, or that the government was estopped." Pet. App. 127a; *see also id.* at 128a-129a ("'[e]xclusive jurisdiction over review of

[6] In addition, petitioners' arguments fail even on their own terms, because they amount to nothing more than a highly case-specific challenge to the application of settled principles of res judicata and collateral estoppel in the particular circumstances of this case.

final FCC orders is vested in the Court of Appeals'") (citation omitted)); *id.* at 115a ("the bankruptcy court exceeded its statutory jurisdiction by engaging in such review"); *id.* at 129a ("Jurisdiction over all but a few FCC regulatory actions is restricted to the courts of appeals") (citing 47 U.S.C. § 402); *id.* at 129a ("'[J]urisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals'") (quoting 28 U.S.C. § 2342).

Under the Second Circuit's decision, the exclusive-jurisdiction provisions of 47 U.S.C. § 402 meant that the D.C. Circuit was the appropriate court to review final regulatory decisions of the FCC and apply the substantive provisions of the Bankruptcy Code to determine whether such decisions were contrary to law. *See* Pet. App. 131a. Thus, the judgment below fully comports with the Second Circuit's holding that only the D.C. Circuit, and not the bankruptcy court (or the Second Circuit) possessed jurisdiction to review the FCC's actions.

B. The judgment below does not conflict with the decisions of other circuits

Arctic Slope (but not the FCC or Verizon) argues that the judgment below conflicts with decisions of the First, Fifth, and Ninth Circuits that allegedly endorse a "narrow" reading of § 525(a)'s requirement that the prohibited license denial or revocation occur "solely because" the debtor files for bankruptcy or fails to pay a dischargeable debt. Arctic Pet. 18-20. This "narrow" reading purportedly conflicts with what Arctic Slope claims is the D.C. Circuit's holding "that Section 525 is violated any time the failure to pay a dischargeable debt is a 'but for' cause of a prohibited action against a debtor." Arctic Pet. 18.

Arctic Slope mischaracterizes the holding below. The D.C. Circuit did not adopt or apply a "but for" causation test. Rather, the D.C. Circuit found that the "failure to make payments was the 'sole' trigger of the license cancellation, *in the sense that the Commission looked to no other factor in determining whether NextWave should retain its licenses.*" Pet.

App. 45a (emphasis added). Thus, the court used the term "sole trigger" to indicate that non-payment was the *only* basis for the cancellation decision, not merely a but-for cause. Accordingly, the purported conflict alleged by Arctic Slope is not presented here.

Even apart from this mistaken characterization, there is no basis for Arctic Slope's claim of conflict. In *In re Exquisito Services, Inc.*, 823 F.2d 151 (5th Cir. 1987), the Fifth Circuit *affirmed* the bankruptcy court's factual finding of a § 525 violation where the debtor's Chapter 11 filing was the sole trigger for the failure to renew a contract option. The court adopted a literal interpretation of § 525(a) that "focused on the specific language of the section," 823 F.2d at 153, just as the D.C. Circuit did below.

Laracuente v. Chase Manhattan Bank, 891 F.2d 17 (1st Cir. 1989), and *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264 (9th Cir. 1990), both involved claims against private employers for adverse employment actions allegedly taken in violation of § 525(b), and thus cannot present any conflict with the D.C. Circuit's application of § 525(a). Moreover, in both of these cases the private employer possessed independent grounds for terminating or failing to hire the debtor, separate and apart from the debtor's bankruptcy filing. In *Laracuente*, the "discharge was not due solely to the bankruptcy petition," but instead "occurred as a result of the Bank's investigation of Laracuente's [fraudulent] participation in loans to family members and her husband['s] . . . employees." 891 F.2d at 23. In *Comeaux*, the evidence clearly established that the employer was not going to hire the debtor for non-bankruptcy reasons even before it learned of his Chapter 13 bankruptcy filing. *See* 915 F.2d at 1269. Thus, the bankruptcy filing was not the "sole" cause of the employer's failure to hire the debtor. *Id.*

In this case, by contrast, the sole criterion used by the FCC in revoking NextWave's licenses was the very factor expressly prohibited by § 525(a): NextWave's failure to pay a debt while in bankruptcy. *See* Pet. App. 45a. Thus, there is no circuit conflict, and review is not warranted.

II. The Question Presented Is Not Sufficiently Important To Warrant Review

Lacking any credible claim of a circuit conflict, petitioners expend considerable energy attempting to demonstrate that the decision below "radical[ly] alter[s]" and "seriously impair[s]" the FCC's authority to allocate spectrum and "thwarts" its ability to employ the auction mechanism. FCC Pet. 14-20; Verizon Pet. 16-19; Arctic Pet. 23-27. These assertions are meritless.

First, recent events dramatically undercut the sincerity of petitioners' expressions of concern about the decision below. As noted above, in November 2001 the Department of Justice and the FCC consented to a contingent settlement of this case that, *inter alia*, provided for the withdrawal of the pending petitions for certiorari upon the occurrence of specified events in the settlement approval process. Although the settlement agreement subsequently terminated, the fact that the FCC was more than willing to settle this litigation in a manner that left it subject to the D.C. Circuit's decision belies petitioners' dire predictions about the allegedly dramatic impact of the decision below.

The FCC's willingness to accept the decision below as part of a settlement was fully justified, because the simple truth is that the D.C. Circuit's § 525(a) holding has little if any future significance, either for the FCC or for other agencies, and the government will have no difficulty implementing auction schemes, notwithstanding the continued existence of the decision below. Indeed, the decision below is inextricably bound up with the FCC's now-abandoned installment-payment scheme, and has no prospective implications for the FCC's existing auction procedures. Moreover, in the unlikely event that the FCC were to reconsider its abandonment of installment payments, nothing in the D.C. Circuit's decision would prevent the FCC from enforcing licensing conditions separate from non-payment of installment debts without violating § 525(a). Thus, the consequences predicted

by petitioners are illusory, and this Court's review is not warranted.

A. The question presented is of narrow applicability and is unlikely to recur

Perhaps the most obvious reason why certiorari is unwarranted is the fact that several years before the D.C. Circuit's decision below, the FCC abandoned the unique installment-payment program that gave rise to the § 525(a) issue in this case. *See In re Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures*, 13 FCC Rcd. 374, ¶ 40 (1997) ("installment payments should not be offered in auctions"); *In re Amendment of Part I of the Commission's Rules-Competitive Bidding Procedures*, 15 FCC Rcd. 21,520, ¶ 55 (2000) (adhering to previous decision to reject installment payment program). As a result, the question presented will not arise with any frequency in the future.[7]

The § 525(a) issue decided below arose only because of the particular details of the FCC's now-rescinded installment-payment scheme, and cannot arise in the absence of those unique circumstances. The crucial factor underlying the judgment below was that the FCC attempted to cancel NextWave's licenses solely for nonpayment of installments due to the FCC during the bankruptcy proceeding. By eliminating installment payments, the FCC has, as a prospective matter, eliminated the factual predicate for the type of § 525(a) claim at issue here.

[7] Though the FCC itself chose to disavow installment payments long *before* the D.C. Circuit issued its decision (and indeed, long before the § 525(a) issue had even arisen in the proceedings below), petitioners imply that the D.C. Circuit has somehow nullified Congress's will because installment-payment plans were expressly suggested in § 309(j). As the FCC recognized in deciding to eliminate the installment program, however, Congress did not mandate the use of installment plans; nor did it purport to override other provisions of federal law that might make an installment-payment approach less than optimal for the FCC. Even if there were some tension between the precatory suggestion of § 309(j) and the unambiguous command of § 525(a), the latter would necessarily control. But as demonstrated *infra*, no such tension exists.

Indeed, the FCC has already said as much. When NextWave sought this Court's review of the Second Circuit's mandamus decision, the FCC expressly argued that certiorari was not warranted in view of the fact that "the FCC has eliminated its installment payment program and requires payment in full *before* the license issues." FCC Br. in Opp., *NextWave Pers. Communications, Inc. v. FCC*, No. 00-447, at 12 (filed Oct. 30, 2000). As the FCC observed at the time, "the likelihood that the precise issue presented by the petition . . . will recur is diminished" by the elimination of the installment program. *Id.* This Court denied certiorari in No. 00-447, and the same result is appropriate here.

Petitioners suggest that, even outside an installment-payment setting, a prospective licensee could evade its financial obligations to the FCC by exploiting the "delay between the close of an auction and the time that the bidder's payment becomes due." Arctic Pet. 24; *see also* FCC Pet. 19; Verizon Pet. 18. This concern is baseless. In the first place, it is exceedingly implausible that a company would or could expend the time, effort, and money required to be a high bidder at an FCC spectrum auction (including payment of a substantial up-front deposit) only then to execute the improbable bankruptcy scenario envisioned by petitioners.

Moreover, even this unlikely factual scenario would not lead to the result that petitioners posit. Under the FCC's auction procedures, licenses are granted only "upon the full and timely payment of winning bids." 47 C.F.R. § 1.2109(a) (2000); *see Competitive Bidding Proceeding*, 63 Fed. Reg. 2315, 2327, 2343 (1998). Before that transfer takes place, the agreement between the FCC and the high bidder constitutes an "executory contract" under 11 U.S.C. § 365. *See* H.R. REP. NO. 95-595, at 347 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6303 (executory contracts are "contracts on which performance remains due to some extent on both sides"). If the high bidder declared bankruptcy and then

chose to "assume" an executory contract in order to obtain its benefits (here, issuance of the licenses), it would be bound to perform all of its obligations under the "assumed" contract, including paying all amounts due. *See* 11 U.S.C. § 365(b)(1) (preventing assumption of executory contract under Bankruptcy Code without cure of default and adequate assurance of future performance).[8] If, on the other hand, the bidder chose to "reject" the executory contract, the FCC would have no obligation to perform its side of the contract by granting the licenses (and would remain free to seek appropriate penalties for the bidder's default). Either way, the FCC would not be required to transfer the licenses before receiving full payment.

Petitioners' concerns are misplaced for another reason: As the D.C. Circuit recognized, § 525(a) does not restrict or limit the FCC's ability to adopt and enforce regulatory conditions as it deems appropriate; the statute merely prevents adverse licensing decisions based solely on non-payment of a dischargeable debt. Pet. App. 50a. The FCC violated § 525(a) in this case because it made NextWave's non-payment the "sole trigger" for license cancellation. Pet. App. 45a. But § 525(a) is not implicated by licensing decisions that are based on factors other than non-payment of a dischargeable debt. *See* Pet. App. 46a, 50a. Accordingly, the FCC remains free to adopt prospective regulations making future licensing decisions depend on an *array* of factors; what it cannot do is what it did here, which is to make cancellation decisions based solely on non-payment of a dischargeable debt.

[8] If the high bidder were to default after affirmatively assuming the contract, § 525(a) would again provide no protection. The sums owed on account of a post-assumption default would constitute post-petition administrative expenses under 11 U.S.C. § 503, meaning they would receive priority (11 U.S.C. § 507(a)(1)), and would not be dischargeable. *See* 11 U.S.C. § 1129(a)(9)(A) (reorganization plan may not be confirmed without, *inter alia*, full payment of § 507(a)(1) claims). Because § 525(a) prohibits license denial for non-payment of a *dischargeable* debt, it would not be triggered by the nondischargeable debt arising from a post-assumption default.

Petitioners thus fail in their efforts to derive some continuing significance from the decision below. The FCC has abandoned the installment-payment scheme that gave rise to the question presented in this case, and as a result there is no likelihood that issues of this kind will arise in the future. Moreover, the FCC—or any other government agency contemplating an auction program—can easily ensure that its future licensing decisions do not violate § 525(a). Accordingly, the D.C. Circuit's decision does not pose any threat to legitimate regulatory objectives.

B. Review is inappropriate because alternative grounds justify the decision

Review is also unwarranted in this case because the ultimate judgment would be the same no matter how the question presented in the petitions is resolved. The D.C. Circuit held that, separate and apart from § 525(a), NextWave's licenses are also protected by the Bankruptcy Code's automatic stay, 11 U.S.C. § 362(a)(4)-(5). Pet. App. 40a-41a. The existence of this alternative ground for the decision below counsels strongly against the exercise of certiorari jurisdiction. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183-84 (1959); *Lawson v. Murray*, 515 U.S. 1110, 1116 (1995) (Scalia, J., concurring in denial of certiorari).

In this case, the D.C. Circuit squarely held that the automatic stay applies to protect NextWave's licenses, expressly rejecting the FCC's arguments that the attempt to revoke NextWave's licenses was "an action exempt from the automatic stay." Pet. App. 41a. The D.C. Circuit concluded that the FCC's license cancellation was an attempt to enforce its liens on the licenses through self-help repossession, a clear violation of the lien-enforcement provisions of the automatic stay contained in 11 U.S.C. § 362(a)(4)-(5). Pet. App. 40a-41a.

The FCC asserts that the D.C. Circuit's automatic-stay holding is not "an independent ground" for the decision, be-

cause it was "merely part of the . . . analysis of the Section 525 issue[.]" FCC Pet. 28 n.10. But the fact that the D.C. Circuit resolved the automatic-stay issue in the course of rejecting the FCC's arguments about § 525(a) does not change the binding quality of the court's automatic-stay holding. Actions taken in violation of the automatic stay are void. *In re 48th Street Steakhouse, Inc.*, 835 F.2d 427, 431 (2d Cir. 1987). Thus, the FCC's attempt to cancel NextWave's licenses was invalid wholly apart from § 525(a).

The FCC and Verizon argue in passing that the D.C. Circuit's automatic-stay holding is incorrect, asserting that spectrum licenses are not "'property of the estate'" and are therefore not protected by the automatic stay. FCC Pet. 28 n.10; *see also* Verizon Pet. 27 n.11. That argument is patently incorrect; the law is clear that FCC licenses are property of the estate for bankruptcy purposes. *See, e.g., In re GWI PCS 1, Inc.*, 230 F.3d 788, 803 n.29 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2623 (2001); *In re Cent. Ark. Broad. Co.*, 68 F.3d 213, 214-15 (8th Cir. 1995); *In re Tak Communications, Inc.*, 985 F.2d 916, 918 (7th Cir. 1993); *In re Fugazy Express, Inc.*, 124 B.R. 426, 430 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2d Cir. 1992); *see generally United States v. Whiting Pools*, 462 U.S. 198, 204-05 (1983) ("property of the estate" is construed broadly). Indeed, the FCC itself obviously concluded that NextWave has a *property* interest in the licenses, because it used that interest as collateral. *See* Pet. App. 402a-403a.

Despite the fact that it filed UCC financing statements to protect its security interests in NextWave's licenses, and despite its prior admission that canceling the licenses would be "'tantamount . . . to foreclosing on collateral,'" Pet. App. 41a, the FCC now contends that the license cancellation "was not an effort to enforce a lien" because it was done pursuant to a "regulatory requirement." FCC Pet. 28 n.10. That reasoning incorrectly assumes that there is a regulatory exception to § 362(a)(4)-(5). The Bankruptcy Code contains a regulatory exception to certain aspects of the automatic stay (*see* 11 U.S.C. § 362(b)(4)), but that exception specifically

does not apply to the lien-enforcement provisions in subsections (a)(4) and (5). Petitioners' argument thus violates the cardinal rule that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied . . . ." *TRW Inc. v. Andrews*, 122 S. Ct. 441, 447 (2001) (internal quotation marks omitted). In addition, the FCC cannot plausibly claim that its allegedly "regulatory" action was dissociated from its liens, because the very regulation at issue expressly linked automatic license cancellation with "*debt collection* procedures." 47 C.F.R. § 1.2110(f)(4)(iv) (1998) (emphasis added) (Pet. App. 495a); *see also* 47 C.F.R. § 1.2110(e)(4)(iii) (1997) (Pet. App. 480a).

The result reached below is also supported by additional alternative grounds not resolved by the D.C. Circuit and not challenged in the petitions. For example, the automatic cancellation violated NextWave's due process right to fair notice, because NextWave lacked "ascertainable certainty" that the FCC would cancel its licenses for non-payment even while NextWave was a debtor in bankruptcy. *See Trinity Broad. of Florida, Inc. v. FCC*, 211 F.3d 618, 619, 628 (D.C. Cir. 2000). Although the D.C. Circuit did not resolve NextWave's fair-notice claim under *Trinity*, the court expressly held that "it was unclear prior to the [January 12, 2000] notice of re-auction that the automatic cancellation policy would apply to licensees who had filed for bankruptcy." Pet. App. 21a. Indeed, the FCC's "own conduct suggests that it was at best unsure whether the automatic stay blocked cancellation of the company's licenses" (*id.*), and the FCC's statements gave NextWave ample reason to believe that its licenses were protected: "[I]n the bankruptcy court, Commission counsel suggested that the automatic stay blocked cancellation of NextWave's licenses, stating for example that although '[t]he regulations provide that upon failure to make the payments the license is automatically canceled[,] . . . [t]hat hasn't [happened] in this case due to the automatic stay.'" *Id.* at 21a-22a (citation omitted). The D.C.

Circuit's findings in this regard would plainly support NextWave's fair-notice claim under *Trinity* as well.[9]

The FCC would have to prevail on each alternative ground in order to succeed in canceling NextWave's licenses. This demonstrates that—contrary to petitioners' suggestions—the amount of money allegedly at stake in this case does not justify review.[10] This case cannot be resolved in favor of the government on these petitions; and, even if petitioners were somehow to prevail in this Court on their § 525(a) arguments, NextWave's remaining claims would necessitate further lengthy judicial proceedings and would prevent petitioners from achieving any final success on remand. For these reasons as well, certiorari is not warranted.

C. This Court has already denied certiorari in a "closely related" case that had a far greater impact on the FCC's auction program

This Court recently denied certiorari in *In re GWI PCS 1, Inc.*, 230 F.3d 788 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2623 (2001). Petitioners' silence about that event is remarkable, because the similarities between that case and this one are plain. The *GWI* case concerned a C-Block licensee that was a high bidder at the very same auction as NextWave, subject to the same installment-payment rules. Under the Bankruptcy Code, GWI avoided full payment on its licenses but was permitted (over the FCC's objections) to retain them. The connection between the cases is so clear that, one week before the denial of certiorari in *GWI*, the petition in that case was relisted for conference after the Acting Solicitor General informed this Court of the D.C. Circuit's *NextWave* decision. He stated that *NextWave* "addresses legal questions closely related to those raised in [the *GWI*] certiorari petition." Letter from Paul D. Clement, Acting Solicitor General, to William K. Suter, Clerk, No. 00-1621 (filed June 22, 2001).

Significantly, the FCC's petition in *GWI* described the alleged impact of that decision on the FCC's auction scheme in dire terms even more extreme than those employed here. *See* Pet. for Cert., *United States v. GWI PCS 1, Inc.*, No. 00-1621 at 14 (filed Apr. 23, 2001) (Fifth Circuit's "decision undermines and distorts the increasingly-important market-based system of license allocation"); *id.* at 16 (court "usurped the FCC's exclusive regulatory function"); *id.* at 17 ("The Fifth Circuit effectively transferred the FCC's congressionally granted regulatory authority over spectrum licensing to the bankruptcy court . . . ."); *id.* at 20 (decision "threatens ongoing distortion of the FCC's auction process" and "might encourage speculative bidding in future auctions").

If any case posed a threat to the FCC's auction process, it would have been *GWI*, since it allowed a debtor to keep its licenses without making full payment to the FCC. By contrast, the D.C. Circuit's holding in this case does not threaten the FCC's existing regulatory scheme in any way, and does not affect NextWave's obligation to pay the FCC in full—an obligation that NextWave's proposed plan of reorganization would fully satisfy. Nor would the decision below pose a significant obstacle even in the unlikely event that the FCC decided to reinstate an installment-payment option.

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[9] Another alternative ground not addressed by the D.C. Circuit was NextWave's right to cure defaults. Debtors in Chapter 11 are permitted to provide in their reorganization plans for the "cur[e]" of "any default," "[n]otwithstanding any otherwise applicable nonbankruptcy law." 11 U.S.C. § 1123(a), (a)(5)(G). To cancel NextWave's licenses without allowing it to cure its payment default would violate that important right. In addition, the D.C. Circuit also left unresolved NextWave's claims of waiver and estoppel.

[10] This Court often denies review in cases involving large sums of money. *See, e.g., United States v. GWI PCS 1, Inc.*, 121 S. Ct. 2623 (2001) (denying certiorari despite government's claim that it was deprived of billions of dollars of potential revenue); *Exxon Mobil Corp. v. Baker*, 531 U.S. 919 (2000) (denying certiorari in case concerning validity of $5 billion punitive damages award). The only case petitioners cite on this point, *United States v. Mitchell*, 463 U.S. 206 (1983), was obviously certworthy regardless of the amount of damages, because the Court was able to "resolve . . . confusion" about important questions of recurring national importance. *Id.* at 212, 225-28.

In addition, in *GWI* the Fifth Circuit expressly "disagree[d] with the Second Circuit's conclusion" in this case regarding the timing of high bidders' financial obligations to the FCC. 230 F.3d at 808. Thus, the *GWI* case involved an actual circuit conflict, in marked contrast with the D.C. Circuit's decision here. That this Court nonetheless denied certiorari in *GWI* further confirms the absence of any basis for review here.

III. The Judgment Below Is Clearly Correct

Petitioners also assert that the opinion below reflects an erroneous interpretation of § 525(a). Even if true, of course, that assertion would not justify this Court's review. *See, e.g.*, *Ross v. Moffit*, 417 U.S. 600, 616-17 (1974). Correctness review is particularly inappropriate in a case like this one, where the question presented is unlikely to recur.

In any event, the D.C. Circuit correctly interpreted and applied § 525(a). The language of the statute is clear and unambiguous: "a governmental unit may not . . . revoke" a debtor's license "solely because" the debtor "has not paid a debt that is dischargeable" in bankruptcy. Under the plain language of this statute, the FCC's automatic revocation of NextWave's licenses for failure to make a dischargeable installment payment was unlawful.

Notwithstanding this commonsense and self-evident conclusion compelled by the unambiguous text of § 525(a), petitioners argue that the D.C. Circuit's application of § 525(a) in the particular factual setting of this case is erroneous. Petitioners' assertions are meritless.

A. The FCC's attempted "automatic" license revocation occurred "solely because" NextWave failed to pay its debt

The D.C. Circuit correctly found that the FCC's attempted revocation occurred "solely because" of NextWave's failure to pay a dischargeable debt: "NextWave's failure to make its payments was . . . the 'sole' trigger of the license cancellation, in the sense that the Commission looked to no

other factor in determining whether NextWave should retain its licenses." Pet. App. 45a. Petitioners contend that this finding was erroneous, because the requirement of full and timely payment had implications regarding a licensee's fitness to hold a license, and not merely a monetary purpose. FCC Pet. 24.

This argument is patently incorrect. Every licensing decision made by a government agency will, by definition, have a "regulatory" purpose. If the mere existence of a regulatory nexus were sufficient to defeat the protections of § 525(a), those protections would be nugatory. Under the plain text of the statute, however, the dispositive question is not whether the agency had a regulatory purpose for its action, but rather whether the action was based solely on non-payment of a dischargeable debt.

Here, the FCC looked to one factor and one factor only in revoking the licenses: NextWave's non-payment of a debt. *See* Pet. App. 72a-73a, 96a-97a; C.A. App. 452-55. Indeed, the FCC has repeatedly asserted that the cancellation was "automatic"—without thought or reflection—based solely on NextWave's failure to make installment payments. *Id.* As the D.C. Circuit correctly found, the FCC made no effort whatsoever to consider any "extrinsic evidence of fitness to hold a license," and instead "allow[ed] license cancellation to rest solely on failure to pay a dischargeable debt." Pet. App. 47a. The FCC may have had various reasons for employing non-payment as the only factor in this cancellation decision, but the crucial fact is that non-payment was the sole, exclusive, and automatic basis for the FCC's action—in patent violation of § 525(a).[11]

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[11] Nor does the legislative history support petitioners' arguments. To the contrary, as the D.C. Circuit correctly recognized, the legislative history confirms that "[t]he purpose of [§ 525] is to prevent an *automatic reaction* against an individual for availing himself of the protection of the bankruptcy laws." H.R. REP. NO. 95-595, at 165 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6126 (emphasis added); *see* Pet. App. 46a.

Petitioners' argument would render § 525(a) a dead letter. By its terms, § 525(a) is aimed exclusively at *government* action. Under petitioners' interpretation, however, whenever a governmental agency incorporates payment obligations into its regulations and proffers a "regulatory purpose" for doing so, § 525(a) would be inapplicable, and the agency could then proceed to revoke debtors' licenses based on nothing other than non-payment. The FCC cites no authority for that absurd proposition, which would allow agencies to eviscerate § 525(a) by the simple artifice of issuing regulations mandating timely payment of all debts. The plain language of the statute precludes that result, because it forbids *all* efforts to cancel licenses solely because of non-payment, regardless of the source of, or perceived regulatory justifications for, the underlying payment obligation. Section 525(a) was adopted in furtherance of the Bankruptcy Code's overarching goal of providing financially distressed companies with breathing room to be rehabilitated in a manner that preserves assets and ongoing businesses so that creditors may be paid. *See* S. REP. NO. 75-989, at 81 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5867 (purpose of § 525 is to allow distressed company a "fresh start" and opportunity to move forward without regard to status as a debtor or failure to pay a debt dischargeable in bankruptcy); *see also* 4 COLLIER ON BANKRUPTCY ¶ 525.02 at 525-4 (15th ed. rev. 2001).

Unsurprisingly, courts uniformly hold that § 525(a) is applicable even where the underlying payment obligation purportedly serves regulatory interests as well. *See In re Walker*, 927 F.2d 1138, 1142-43 (10th Cir. 1991) (§ 525(a) precludes "automatic revocation" of licenses for non-payment of statutorily-mandated obligation); *In re Williams*, 158 B.R. 493, 495-96 (Bankr. D. Idaho 1993) (§ 525 violated by automatic suspension of license even where government agency is acting "to enforce [its] regulatory power"); *In re Bill*, 90 B.R. 651, 657-59 (Bankr. D.N.J. 1988) (§ 525 applies despite important "public policy concerns reflected in the [regulatory] surcharges"). Petitioners cite no cases to the contrary, nor could they.

B. NextWave's debt is "dischargeable" within the meaning of § 525(a)

The FCC also argues that NextWave's payment obligations are not dischargeable debts within the meaning of § 525(a) because they are "express regulatory conditions." FCC Pet. 22. This is simply incorrect. The missed installment payments that triggered cancellation of NextWave's licenses constitute monetary obligations due to the FCC; they are evidenced by promissory notes and secured by UCC financing statements, and thus clearly qualify as "debts." *See* 11 U.S.C. § 101(12) (defining "debt" as any liability on a claim), 101(5) (defining "claim" broadly to encompass every kind of "right to payment").

Contrary to the FCC's assertions, moreover, the fact that the FCC's regulations required licensees to pay their debts to the FCC does not render such debts non-dischargeable. Under the Bankruptcy Code, "any debt" is dischargeable unless it falls within a statutory exception to discharge. *See* 11 U.S.C. §§ 523, 1141(d)(1)(A). There is no "regulatory" or other exception to discharge applicable to NextWave's debts. The FCC does not even attempt to dispute this point, nor could it.

At bottom, the FCC's non-dischargeability argument reduces to the proposition that § 525(a) should be deemed inapplicable whenever an agency chooses to promulgate a regulation making payment of debts a regulatory condition of licensure. This assertion contradicts the statute's plain text and finds no support in case law, legislative history, or common sense. By its very nature, § 525(a) is aimed at prohibiting specific regulatory action. Allowing agencies to exempt their actions from § 525(a) merely by issuing regulations would nullify the statute. As the D.C. Circuit correctly recognized (and as the FCC acknowledged below), this argument "amounts to a request for a regulatory purpose excep-

tion to section 525," an exception that Congress clearly chose not to create. Pet. App. 43a-44a.[12]

Moreover, the FCC's dischargeability argument is predicated on an erroneous reading of the Second Circuit's December 1999 opinion. According to the FCC, the Second Circuit "held" in that opinion that "[s]o long as [NextWave] held the licenses" its debts "were not 'dischargeable' in bankruptcy." FCC Pet. 22. The FCC is mistaken; the reader will search the Second Circuit's opinion in vain for any discussion of the question whether NextWave's debts were dischargeable in bankruptcy. Indeed, no such question was even presented in that appeal. As noted above, the Bankruptcy Code itself provides for the dischargeability of "any debt." 11 U.S.C. § 1141(d)(1)(A). In this instance, NextWave's debt to the FCC is "dischargeable" within the meaning of § 525(a) because it is precisely the type of obligation that is subject to discharge under § 1141. Under the Administrative Procedure Act, the D.C. Circuit clearly possessed the authority to determine whether the FCC's cancellation of NextWave's licenses was contrary to law, including § 525(a)'s prohibition against the cancellation of a license for non-payment of a dischargeable debt. Pet. App. 16a-18a, 36a-37a. Accordingly, the FCC's argument is entirely baseless.[13]

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[12] When Congress desires to create specific exceptions for governmental agencies under particular provisions of the Bankruptcy Code, it does so expressly. *See, e.g.*, 11 U.S.C. § 525(a) (exempting certain Department of Agriculture actions).

[13] For the first time in this case, Verizon now suggests that NextWave's debts are not dischargeable because the "relation" between NextWave and the FCC remains executory and therefore constitutes an "executory contract" that does not give rise to a dischargeable debt under the Code. *See* Verizon Pet. 27-29. This argument is incorrect, because the transaction giving rise to NextWave's debt is not executory in nature. The FCC's obligation—namely, issuance of the licenses to NextWave—was performed in 1997. Only payment of the debt by NextWave remains, and thus performance is due on one side only, precluding characterization as an executory contract. Moreover, Verizon's argument has been waived, because it was neither pressed nor passed upon below. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976).

C. Nothing in the Communications Act or the Bankruptcy Code allows the FCC to trump § 525(a)

Petitioners also argue that the D.C. Circuit's § 525(a) holding is "at odds with the structure of the Bankruptcy Code" (FCC Pet. 25), or "creates disharmony with other aspects of the Code." Verizon Pet. 26. This argument rests on the vague assertion that "[t]he Bankruptcy Code generally exempts regulatory action from the Code's provisions." FCC Pet. 25; *see also* Verizon Pet. 26. The only evidence that petitioners offer for such a "general" exemption is 11 U.S.C. § 362(b)(4), but the plain language and structure of the Bankruptcy Code preclude petitioners' argument.

By its own terms, § 362(b)(4) operates as an exception to only *a few specified subsections* of § 362(a)'s automatic stay. There is no basis for expanding that carefully crafted exception beyond its terms. *See TRW Inc. v. Andrews*, 122 S. Ct. at 447. Fashioning an implied regulatory exception to § 525(a) would be particularly inappropriate, because the prohibitions set forth in that provision are aimed *exclusively* at "governmental unit[s]," and thus by definition protect *only* against specific regulatory action. Indeed, Congress expressly waived sovereign immunity with respect to claims under § 525. *See* 11 U.S.C. § 106. Moreover, § 525(a) expressly exempts some regulatory actions from its scope. *See* 11 U.S.C. § 525(a) (exempting certain actions by the Department of Agriculture). As the D.C. Circuit explained, Congress's decision to exempt another agency (but not the FCC) from the scope of § 525(a) convincingly demonstrates that Congress intended no exemption for the FCC. *See* Pet. App. 43a-44a.

Nor is there any provision in the Communications Act that overcomes the clear applicability of § 525(a). The FCC argues that the Act does not permit the FCC's adoption of

competitive bidding to diminish the FCC's authority. FCC Pet. 26 (citing 47 U.S.C. § 309(j)(6)(C)). But that assertion is irrelevant, because the advent of competitive bidding did not alter the applicability of § 525(a). Both before and after the FCC's adoption of competitive bidding, the FCC was subject to the requirements of § 525(a) in those circumstances where it applies. Moreover, as demonstrated above, the FCC can readily ensure that its auction program and licensing decisions do not violate § 525(a). There is thus no no basis for the FCC's attempt to evade the express requirements of that statute.

CONCLUSION

In the decision below, the D.C. Circuit did precisely what the Second Circuit contemplated that it would: It decided the merits of NextWave's challenge to the FCC's attempted cancellation of NextWave's licenses. The D.C. Circuit's well-reasoned decision follows directly from the plain language of § 525(a), does not conflict with the decisions of any other court, and is supported by multiple alternative grounds. The D.C. Circuit applied § 525(a) in precisely the manner for which it was intended, allowing NextWave an opportunity to rehabilitate itself and submit a plan of reorganization that would both pay creditors in full and complete the commercialization of NextWave's licenses. Moreover, the question presented in the petitions is unlikely to recur, because the FCC's abandonment of the installment-payment program has deprived this issue of any future significance. For all these reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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February 1, 2002

APPENDIX

TABLE OF CONTENTS
FOR RESPONDENTS' APPENDIX

Appendix A (Opposition by the Federal Communications Commission to NextWave's Motion for a Stay Pending Judicial Review or for Expedited Consideration (D.C. Cir. filed Oct. 6, 2000)) 1a

Appendix B (Opposition of the Cellular Telecommunications Industry Association, et al. to NextWave's Motion for a Stay Pending Judicial Review (D.C. Cir. filed Oct. 6, 2000)) 3a

Appendix C (Order of the D.C. Circuit Denying FCC's Motion to Stay Mandate (D.C. Cir. Aug. 23, 2001)) 6a

Appendix D (Statement of FCC Chairman Michael Powell on Conclusion of Discussions on NextWave Licenses (Nov. 16, 2001)) 8a

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-1402; 00-1403

NEXTWAVE PERSONAL COMMUNICATIONS, INC., *ET AL.*,
Appellants/Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Appellees/Respondents

[Filed: October 6, 2000]

OPPOSITION BY THE FEDERAL COMMUNICATIONS COMMISSION TO NEXTWAVE'S MOTION FOR A STAY PENDING JUDICIAL REVIEW OR FOR EXPEDITED CONSIDERATION

The Federal Communications Commission ("FCC" or "Commission") hereby opposes NextWave's request for a stay of the scheduled auction on December 12, 2000. NextWave has failed to satisfy the requirements for obtaining a stay; most fundamentally, the requirement that it show irreparable harm to it resulting from the auction. No harm will befall NextWave, because the Commission has expressly conditioned the results of the auction on the outcome of this case. Should NextWave prevail it will get its licenses back.

* * *

II. ARGUMENT

* * *

[page 9]

Here the auction NextWave seeks to enjoin is the auction of the spectrum previously licensed to it. Yet NextWave has failed to demonstrate any harm to it, irreparable or otherwise, that will result from the conduct of that auction. As NextWave undoubtedly knows, but fails to mention anywhere in its stay papers, the Commission has informed auction participants that the auction will be conducted subject to pending litigation.[26] This means that, notwithstanding the auction, if NextWave prevails before this Court it will get its licenses back. Therefore, the Commission has ensured that "corrective relief will be available at a later date," if such relief is ultimately appropriate. Wisconsin Gas Co. [v. FERC], 758 F.2d [669,] 674 [D.C. Cir. 1985)], quoting Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

In view of this reservation of rights, of which all auction participants will be on notice, NextWave cannot demonstrate any harm to it whatsoever from the Commission's conduct of the auction on the scheduled date.

* * *

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[26] See C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000 Rescheduled for December 12, 2000, Public Notice, DA 00-2038 at 5-6 (rel. Sept. 6, 2000): "Potential bidders and interested parties should be aware that . . . certain judicial proceedings that may relate to the licenses available in Auction No. 35 are pending. . . the auction is subject to such matters. . . . This Public Notice clarifies that the Commission will return the payments made by winning bidders of licenses in Auction No. 35 in the event that such bidders are subsequently required to surrender licenses won to prior applicants or license holders as a result of final determinations reached in pending proceedings."

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case Nos. 00-1402; 00-1403

NEXTWAVE PERSONAL COMMUNICATIONS INC.
And NEXTWAVE POWER PARTNERS INC.
Appellants/Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
And the UNITED STATES OF AMERICA,
Appellees/Respondents.

[Filed: October 6, 2000]

OPPOSITION OF THE CELLULAR TELECOMMNICATIONS INDUSTRY ASSOCIATION, ET AL. TO NEXTWAVE'S MOTION FOR A STAY PENDING JUDICIAL REVIEW

The Cellular Telecommunications Industry Association ("CTIA"), AT&T Wireless Services, Inc., BellSouth Corporation and BellSouth Cellular Corp., Cellco Partnership, d/b/a Verizon Wireless, Dobson Communications Corporation, Nextel Communications, Inc., Sprint Spectrum L.P., d/b/a Sprint PCS, TeleCorp PCS, Inc., and VoiceStream Wireless Corporation (collectively referred to as "the Industry Group")[1] hereby respond to NextWave's motion for a stay

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers. The other wire-

pending judicial review ("motion"),[2] filed September 26, 2000. The Industry Group opposes NextWave's stay request.

[page 2]

* * * The Federal Communications Commission ("FCC" or "Commission") has expressly conditioned the upcoming reauction of the former NextWave licenses (scheduled December 12, 2000) on the outcome of the NextWave litigation and winning bidders will have their bid amounts refunded if NextWave's licenses are reinstated.

* * *

I. THE DENIAL OF A STAY WILL CAUSE NEXTWAVE NO IRREPARABLE HARM

* * *

[page 7]

Third, and equally important, NextWave's licensing interests will not be harmed absent a stay because the reauction is conditioned upon the outcome of NextWave's litigation. It is no coincidence that NextWave fails to raise any harm flowing from the reauction. NextWave's

[page 8]

potential rights to its canceled licenses have been fully protected by the FCC. With regard to the upcoming reauction of its former licenses, the Commission has notified potential bidders that the outcome is subject to the litigation:

> [C]ertain judicial proceedings that may relate to the licenses available in Auction No. 35 are pending or may be subject to further review. Resolution of these matters could have an effect on the availability of spectrum included in Auction No. 35 *and the auction is subject to such matters* . . . .[18]

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less carriers listed above are members of CTIA and are interested in participating in the upcoming reauction.

[2] NextWave filed under the names NextWave Personal Communications Inc. and NextWave Power Partners Inc.

[18] "C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000, Rescheduled for December 12, 2000," *Public Notice*, Report No. AUC-00-35-C (Auction No. 35),

* * *

DA-00-2038 (rel. Sept. 6, 2000) at 6 (emphasis added) (*September 6 Public Notice*); *accord* Public Notice, DA 00-2259 (rel. Oct. 5, 2000) at 6. The FCC has also indicated that if licenses have to be returned, the money bid will be refunded.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1402 September Term, 2000

NextWave Personal Communications Inc. and NextWave Power Partners, Inc., Petitioners
v.
Federal Communications Commission and United States of America, Respondents

BellSouth Corporation, et al., Intervenors

Consolidated with 00-1403

[Decided: August 23, 2001]

BEFORE: Sentelle, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of respondents' motion to stay issuance of the mandate, the opposition thereto, and the reply, it is

ORDERED that the motion be denied. In order to obtain a stay of the mandate pending a petition for writ of certiorari, the Federal Communication Commission (FCC) must show that the "petition would present a substantial question and that there is good cause for a stay." See Fed. R. App. P. 41(d)(2)(A); D.C. Cir. Rule 41(a)(2) (movant for stay of mandate must provide "facts showing good cause for the relief sought"). The FCC has not demonstrated that the petition would present a substantial question. Furthermore, in light of petitioners' stipulation that they will make the effectiveness of their plan of reorganization contingent upon a final decision from the Supreme Court on the issues to be raised in the FCC's petition for writ of certiorari, the FCC

cannot demonstrate that any substantial harm would result from the continuation of the bankruptcy proceedings during the limited pendency of the certiorari petition. See, e.g., Books v. City of Elkhart, 239 F.3d 826 (7th Cir.) (Ripple, J., in chambers) (stay "inquiry must focus on whether the applicant has a reasonable probability of succeeding on the merits and whether the applicant will suffer irreparable injury"), cert. denied, 121 S. Ct. 2209 (2001).

The Clerk is directed to issue the mandate seven days from the date of this order. See Fed. R. App. P. 41(b).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX D

[seal omitted]

NEWS

Federal Communications
Commission
445 12th Street, S.W.
Washington, D.C. 20554

News media information
202 / 418-0500
Internet: http://www.fcc.gov
TTY: 1-888-835-5322

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC. 515 F 2d 385 (D.C. Circ 1974).

FOR IMMEDIATE RELEASE
November 16, 2001

Contact: David Fiske (202) 418-0513
Brian Marriott (202) 418-7121
Maureen Peratino (202) 418-0506

STATEMENT OF FCC CHAIRMAN MICHAEL POWELL ON CONCLUSION OF DISCUSSIONS ON NEXTWAVE LICENSES

I am pleased to announce that discussions have concluded between the government, the auction 35 winners and Nextwave. Under the terms of the agreement: (1) Nextwave will surrender all the C and F block licenses it had previously won; (2) the wireless carriers that won these licenses in the Auction 35 reauction will receive them and be able to put them into use for the public shortly; and (3) the American taxpayer will receive $10 billion, more than twice the amount than would have been received had Nextwave kept the licenses in accordance with recent court rulings.

* * *

Before the agreement is effective, it must be ratified by the Department of Justice, which we expect. In addition, Congressional action will be required to implement the settlement. It is only right that the Congress have an opportu-

nity to pass on the terms and render its judgment as to the benefits for American consumers.

* * *